



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Buongiorno UK
Information Provider (IP):	Not applicable
Service Type:	Unsubscribe request
Complainants:	Michael Johnson
Complaint Number:	8326
Code Version:	6.2
Advertising Rules Version:	2.3

Complaint

The Complainant wrote:

“My wife responded in June this year to a competition she saw on the internet for an iPhone. This was done on her cell number (charged to my account). She ended up in a subscription for “content services”. She never intended to subscribe to services, just to enter the competition. It is clear from the fact that no content was ever downloaded in the time until we noticed the subscription and cancelled it that we had not intended to subscribe to this service. This is a clear breach of rule 11.1.2. I have spoken to the service provider and they try to justify this confidence trick by saying that they sms'd that she had joined a subscription service. We received no such sms. They refuse to refund their charges.”

The Complainant provided the following reason for escalation:

“I am a little confused. I have never specifically made an unsubscribe request. I made a complaint against these people because they subscribed my wife as a result of her entering a competition which is against your rules. What I want is for this company to pay the money back to me (with interest) that they gained as a result of this illegal and unwanted subscription and for your organisation to investigate their breaking of the rules; and if they are found to have broken the rules, for you to fine them for doing so. So if you think that by unsubscribing me the whole case is resolved, then I must disagree with you. If however the case is still proceeding in other departments, but your department has done its job, then that's fine.”

The Complainant refused resolution:

"I am afraid I do **not** accept that the service provider has resolved this complaint to my satisfaction.

The fact is that my wife does not remember the sequence of screens that Buongiorno UK has shown in their response. But it is difficult for us to prove differently, since we did not take screen shots as we went through the process.

Buongiorno seem to ignore the fact that nothing was downloaded while we were subscribed. If we had clearly understood that this was a subscription service, then why would we not have downloaded anything? And why would we have cancelled as soon as we saw the charges on our bill?

But all of this is in any event not really relevant. The subscription came about as a result of an advertisement which suggested the possibility of winning an iPhone. Buongiorno claim that my wife "subscribed via internet web campaign advertisement" they do not say that this web advertisement offered the possibility of winning an iPhone. Your code of conduct 11.1.2 clearly states that "A request from a subscriber to join a subscription service may not be a request for a specific content item and may not be an entry into a **competition** or quiz."

It makes no sense to suggest that we went looking on the internet for a subscription service in order to download items, subscribed to the service knowing that it would cost us R10 per day, and then proceeded to download nothing until we cancelled the subscription after 6 weeks. What happened was that my wife saw an advertisement offering the chance to win an iPhone. She responded to that advertisement and ended up in a subscription service. It was not clear that it was a subscription service, as she would not have subscribed had she known. But the fact is that Buongiorno enticed us (and who knows how many more people who haven't complained) into a subscription service based on the chance to win an iPhone in a competition. This is very clearly against your own rules, but Buongiorno do not even address this point.

So, no, I am not satisfied. I think that we should get our money back, get compensation for all the time spent resolving this problem, and you should be fining Buongiorno for blatant contravention of your code of conduct. Then I will be satisfied.

If you are not willing to do this, then you should just delete that clause from your code of conduct, as it is in any case being ignored by many organisations who obviously do not think you will act against them."

Service provider's response

The SP wrote:

"Member has been unsubscribed and confirmation sms has been sent. We'll investigate to determine if a refund is due.

Attached is the proof of subscription. Member will be contacted to inform of a partial refund. Thanks.”

The SP provided a further response:

“Our investigation shows that the user had subscribed via internet web campaign advertisement.

In the excel sheet attached you will find messages sent to the user, as well as welcome messages informing the user of the subscription and how to end the service when he or she wished to do so. The messages also inform the user of our call centre contact number in the event the user had experienced issues of any sort during the subscription period...

Below is the creative the user had interacted with. The page shows the terms and conditions of the Fun Club service as well as displays the subscription service message and pricing on the creative. More content items are shown to the user, should he or she have wished to want either of the items on offer. After entering his or her cell phone number the user is sent a pin, which needed to be entered on the second page of the creative before being subscribed to the Fun Club Subscription Service. This pin number can be found in the message log attached for your perusal.

On the second page after entering the mobile number the user is required to enter the pin number, which he or she had received via sms, before the subscription could commence and thus billing would occur as well. On the third page of the creative after entering the pin number the user is shown the welcome message of the Fun Club and informed via sms of the subscription service and billing that would occur during this period, as well as given the unsubscribe instruction in the sms notifications. The user is also sent a link to the FunClub website to commence downloading content as shown in the 1st page of the creative.

All pages accessed by the user shows that he or she is in fact interacting with a subscription service.

In this regard we do not deem a refund justified and all interaction with the service shows the user that he or was interacting with a subscription service.

We trust that this is to the secretariats satisfaction. Please note that the complainant is no longer subscribed to our Fun Club Service.”

Sections of the Code considered

4.1.1 Members are committed to honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.

4.1.2 Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

11.1.1 Promotional material for all subscription services must prominently and explicitly identify the services as “subscription services”. This includes any promotional material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material.

11.1.2 Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service. A request from a subscriber to join a subscription service may not be a request for a specific content item and may not be an entry into a competition or quiz.

11.1.3 An advert for a content subscription service which includes examples of the content provided as part of that service must include at least two examples of that content clearly displayed.

11.1.4 Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service.

11.5.1 Instructions on terminating a subscription service must be clear, easy to understand, and readily available.

11.5.2 Customers must be able to unsubscribe from any subscription service via SMS using no more than two words, one of which must be 'STOP'.

11.5.3 The 'STOP' request described above must be charged at the lowest tariffed rate available (with the exception of reverse billed rates).

11.5.5 Members must ensure that the termination mechanism is functional and accessible at all times.

Decision

In adjudicating a matter the Adjudicator has to rely on the information submitted and hence presented to him/her. The Adjudicator has taken note of the Complaint and the SP's subsequent response.

Whether the SP has provided proof of subscription or not, is not relevant in this matter. The Adjudicator is also not convinced that the so-called "proof" provided can be relied upon. The Adjudicator has done various adjudications over the same period pertaining to the Fun Club service which illustrated numerous complaints pertaining to the system and service itself, highlighting various irregularities.

However, of relevance here is the fact that the SP lures prospective customers or subscribers into subscribing to its system through a competition or quiz. The SP has in fact utilized numerous such tactics. This is evident from its use of "brain-age", "IQ" etc. The iPhone is just another example and the SP in its reply never really addressed this issue.

Section 11.1.2 of the Code of Conduct is very clear on this and there is no ambiguity surrounding it at all: "A request from a subscriber to join a subscription service may not be a request for a specific content item and may **not be an entry into a competition** or quiz."

The SP has gone in length by arguing the fact that the user is indeed subscribed. In SA Contract Law, when a person has signed a contract, irrespective of how good the contract is or not, then subsequent proof of signature, or reference to clauses in the agreement, has no relevance at all if such a person would allege that he / she has been misled into signing or entering the agreement. If it is found that a person has indeed been misled into signing the agreement, then the contract would be deemed null and void. This is precisely what has happened here. The Complainant has been misled into subscribing to the Fun Club service. Any subsequent "proof" is irrelevant.

The Adjudicator has therefore no hesitation in finding the SP in breach of sections 11.1.2 and 11.1.4 of the WASPA Code of Conduct.

This subsequently has lead to the SP being in breach of sections 4.1.1 and 4.1.2 of the Code of Conduct.

The Complaint is upheld.

Sanctions

In determining an appropriate sanction, the following factors were considered:

- The prior record of the SP with regard to breaches of the relevant sections of the Code of Conduct;

The SP is instructed to refund the Complainant in full;

In addition:

1. The SP is required to suspend the service
2. The SP is fined:
 - 2.1. R20 000 for its breach of sections 4.1.1 and 4.1.2; and
 - 2.2. R30 000 for its non-compliance with sections 11.1.2 and 11.1.4

These fines are payable to the WASPA Secretariat within 5 (five) working days notice hereof.